United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: May 9, 2005

TO : Victoria E. Aguayo, Regional Director
Region 21

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: JC Produce, Inc.
Case 21-CA-36348

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After further investigation, the Region resubmitted this Levitz case for advice on whether: (a) the Employer's withdrawal of recognition from the Union was lawfully based on actual loss of majority support under Levitz;[1] and (b) the Employer's allegedly unlawful discharge of five strikers tainted the anti-Union petition relied on by the Employer to withdraw recognition.[2]

We conclude that the withdrawal-of-recognition charge should be dismissed. Specifically, we conclude that there is no evidence that any of the petition signers would likely have been displaced by the five alleged discriminatees if the latter had not been discharged. Therefore, no anti-Union signatures would be discounted from the petition on that basis and the number of signatures would establish actual loss of support in the unit, even if the discriminatees are added to the unit. We also conclude that the anti-Union petitions were not tainted by the alleged 8(a)(3) violations, given the nature of the allegations in this case and the lack of evidence of a nexus between the terminations and the petitions.

FACTS

The facts were originally set forth in the Advice Memorandum dated December 20, 2004. Pursuant to that Advice Memorandum, the Region conducted further investigation into the size of the unit, including whether there is evidence that any of the discriminatees would displace any petition signers if the 8(a)(3) allegations are found to have merit.

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[1] Levitz Furniture Co. of the Pacific, 333 NLRB 717 (2001).

[2] Master Slack Corp., 271 NLRB 78 (1984).

The Region also conducted further investigation on petition signers' knowledge of the terminations and whether the terminations influenced the petitions. The supplemented facts are summarized below.

Teamsters Union Local No. 630 ("the Union") was certified as the collective-bargaining representative of the drivers employed at the Employer's Pico Rivera facility on March 21, 2003. Unsuccessful negotiations for a first contract led to an economic strike starting November 13, 2003.

On December 10, 2003 the Employer filed a charge, 21-CB-13553, alleging Union strike misconduct, such as blocking a truck's ingress, aiming flashlights at truck drivers, placing picket signs over the mirrors of trucks, hitting a driver with a picket sign, and breaking off a truck's antenna. Five strikers were alleged to have participated in the misconduct. On March 5, 2004[3] the Union made an unconditional offer to return on behalf of all strikers. The Employer responded on March 8 that the five strikers implicated in the CB charge would not be permitted to return because of their strike misconduct. On March 9 all strikers returned to their jobs except the five discharged on March 8.

The Employer contends that it did not displace any replacement workers when the strikers returned to their jobs. The Employer was getting ready to open a new facility, with additional driving routes, in San Bernardino the following month. The Employer thus decided to retain all employees in order to staff the San Bernardino facility by transferring some employees. Because negotiations were ongoing, the Employer was also concerned that there could be a resumption of the strike. The Region's investigation did not uncover any evidence to rebut the Employer's assertion that no replacements were displaced.

Around March 23, field service representative Guillermo Andrade, who is not a unit employee, began soliciting signatures from drivers on anti-Union petitions. Andrade collected signatures between March 23 and about April 8. Andrade submitted to the Employer several signed petitions on April 2 and several more on April 9, for a total of 21. As discussed in the December 20 Advice Memorandum, we agree with the Region's conclusion that the petitions are valid expressions of Union disaffection.

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[3] Dates are in 2004 unless otherwise indicated.

The Region's supplemental investigation has revealed that four of the petition signers were aware that some strikers had been terminated. Five other signers had no knowledge of the terminations at the time they signed. Of the remaining twelve signers whose knowledge of the terminations was undetermined, five stated that they were against the Union since before the strike, or turned against the Union because of the way the Union handled the strike and negotiations. Another three signers were hired during the strike and had no relationship with the Union. Another three merely stated that they signed the anti-Union petitions voluntarily because they did not want the Union. One signer never provided an affidavit.

In the meantime, the parties had scheduled a bargaining session for April 13. On April 12, before that scheduled bargaining session, the Employer withdrew recognition from the Union asserting that the 21 signed petitions established the Union's loss of majority support. According to the Employer, on that date the unit consisted of 34 drivers. That number excludes the five discriminatees and includes driver Edgar Ramos, who was not working at the time of the withdrawal of recognition. Ramos had left work during the strike and did not return to work for the Employer until after the withdrawal of recognition.

The Employer contends that Ramos was on leave, and still part of the unit, when recognition was withdrawn. According to Ramos, he stopped working at the Pico Rivera facility because of the labor dispute. When he left, the Employer offered him a position at the soon-to-be-opened San Bernardino facility, which would not be part of the certified bargaining unit. While he awaited contact from the Employer regarding the opening of the new facility, Ramos received no pay and attempted to start his own business. When the new facility opened, the Employer contacted Ramos and offered him employment there. Ramos began working at the new facility after the Employer had withdrawn recognition from the Union. He never returned to work at Pico Rivera.

In June, the Union filed the instant charge alleging that the Employer unlawfully withdrew recognition in violation of Section 8(a)(5), and another charge, 21-CA-36334, alleging that the discharge of the five strikers for asserted strike misconduct violated Section 8(a)(3). The Region had earlier issued complaint in the CB charge alleging strike misconduct by four of the five discharged strikers. In investigating the Section 8(a)(3) allegations, the Region determined that the Employer had a good-faith belief that the terminated employees had engaged in strike misconduct. Nevertheless, the Region also issued a Section

8(a)(3) complaint because the employees denied responsibility for the acts of violence and vandalism. Thus, the issue of whether the five discriminatees actually engaged in the misconduct depends solely on credibility resolutions. The CB charge is being held in abeyance pending the resolution of the Section 8(a)(3) allegations in Case 21-CA-36334.

ACTION

The Region should dismiss the charge because the signatures on the anti-Union petitions establish actual loss of Union support under Levitz and there is insufficient evidence that the terminations of the strikers tainted the petitions.

An employer that withdraws recognition from an incumbent union bears the burden of proving by a preponderance of objective evidence that the union suffered an actual loss of majority support before the withdrawal.[4] An employer that withdraws recognition based on such evidence does so at its peril.[5] If it is incorrect in its assessment of the evidence of loss of support, the employer will violate Section 8(a)(5) by withdrawing recognition.[6] Thus, to determine the sufficiency of evidence of actual loss of support under Levitz it is necessary to determine the correct size and composition of the bargaining unit.

Here, the Employer withdrew recognition based on its assessment that the unit consisted of 34 employees. The Employer included employee Ramos, who signed an anti-Union petition, but was not working at the time of the withdrawal of recognition. We conclude that Ramos should not be included in the unit because he had no expectation of returning to work at the Pico Rivera facility. [7]

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[4] Levitz, 333 NLRB at 725.

[5] Id.

[6] Id.

[7] See, e.g., Boston Pet Supply, Inc., 227 NLRB 1891, 1898 (1977) (employee transferred to new, non-unit warehouse who did not return to old warehouse was excluded from the unit). Cf. Apex Paper Box Co., 302 NLRB 67, 69 (1991) (employees not actively working considered part of the unit if they have a reasonable expectation of returning).

Although the Employer contends that Ramos was on unpaid leave from the unit, the evidence shows that Ramos had no intention of returning to Pico Rivera. When he left, he expressed interest in returning only to the non-unit San Bernardino facility. During his hiatus, he explored other business opportunities. He returned to the Employer only after being offered a non-unit position in San Bernardino. Thus, given that he had no expectation of returning to the unit, he should be excluded from the calculation.

Without Ramos, there are 20 valid anti-Union petitions among 33 actively-employed unit employees. That figure does not include the five strikers alleged to have been unlawfully terminated. Unlawfully discharged employees, however, are part of the bargaining unit and counted for purposes of determining a union's majority status.[8] Employees hired to replace the discriminatees, on the other hand, are not counted as part of the unit when examining majority status, and their antiunion sentiments are disregarded.[9] In this case, some of the petition signers were hired during the strike as replacements. Thus, the calculation of loss of support could be affected by meritorious 8(a)(3)s if some of those petition signers hired during the strike would have been displaced by the discriminatees at the end of the strike if the discriminatees had not been unlawfully terminated.

The Employer contends, however, that it retained all strike replacements after the end of the strike and none would have been displaced by the discriminatees. The Employer asserts that it retained all employees hired during the strike because, due to the impending opening of the San Bernardino facility, it needed additional employees to transfer to that facility. The Employer was also concerned

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[8] Air Express Int'l, 245 NLRB 478, 501 (1979), enf'd in rel. part, 659 F.2d 610 (5th Cir. 1981).

[9] Pratt Towers, Inc., 339 NLRB 157, 159-60 (2003) (in context of 8(a)(3) refusal to hire former strikers who had initially been lawfully discharged, "the antiunion sentiments of the replacements should not be counted;" Chairman Battista relied solely on alternate rationale based on absence of evidence that replacements would have been displaced by discriminatees' instatement); Captain Nemo's, 258 NLRB 537, 553 (1981), enf'd 715 F.2d 237 (6th Cir. 1983) (discriminatees, but not their replacements, counted in determining majority support); Air Express Int'l, 245 NLRB at 501 (same). See also, Jennifer Matthew Nursing and Rehab. Center, 332 NLRB 300, 307 n. 19 (2000).

that there could be an imminent resumption of the strike because negotiations had not concluded.

The Region's investigation revealed no rebuttal evidence of replacements being displaced by strikers. Thus, even if all or some of the discriminatees were to be added to the unit based on meritorious 8(a)(3) determinations, the unit size would merely increase to a maximum of 38 employees and no anti-Union signatures would be discounted. The 20 anti-Union petitions, excluding Ramos's, received by the Employer would establish actual loss even in this enlarged unit.

However, even where, as here, there is objective evidence of an actual loss of majority, an employer may not withdraw recognition if there are serious unremedied unfair labor practices tending to cause employee disaffection from the union.[10] If the unremedied unfair labor practices involved conduct other than a generalized refusal to recognize or bargain with the incumbent union, the Board examines the following factors to determine whether there has been specific proof of a causal relationship between the violations and the subsequent loss of majority support: (1) the length of time between the violations and the withdrawal of recognition; (2) the nature of the violations, including the possibility of a detrimental or lasting effect on employees; (3) the tendency of the violation to cause disaffection; and (4) the effect of the unfair labor practices on employees' morale, organizational activities, and union membership.[11]

We conclude that there is no causal connection between the Employer's presumably unlawful terminations of the strikers and the anti-Union petitions. Although the petitions were signed just a few weeks after the terminations, there is little evidence that a significant number of petition signers were even aware that the strikers were dischared. More importantly, the discharges alleged in this case are not the type of violation that is likely to

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[10] E.g., Vincent Industrial Plastics, 328 NLRB 300, 301 (2001) (withdrawal of recognition unlawful considering unilateral changes and discharge of recently certified union's most active supporter).

[11] Master Slack Corp., 271 NLRB at 84. See also, Williams Enterprises, 312 NLRB 937, 939-40 (1993), enfd. 50 F.3d 1280 (4th Cir. 1995) (successor's unlawful statement that it intended to operate nonunion had causal relationship with subsequent employee petition).

cause employee disaffection. Unlawful discharges generally may support a finding of causation because of the animus in such violations and their tendency to cause disaffection.[12] These were not animus-based terminations, but based on a good-faith belief of strike misconduct. If the Employer is found to have been mistaken regarding the identity of the employees involved in the misconduct, the violation is a technical one, not based on anti-Union sentiment or retaliation. Thus, these terminations are not of the kind that would support a causal nexus under the second and third factors of the Master Slack test.[13].

As to the fourth Master Slack factor, there is no evidence that the terminations had a negative effect on employees' Union sentiments. Initially there were some telephonic statements that suggested that at least some of the drivers may have signed the petition out of fear of retaliation. Affidavit evidence and the additional investigation do not establish that. Rather, a number of petition signers stated that their disaffection with the Union pre-dated the strike or was caused by the Union's conduct during the labor dispute, including strikers' misconduct. Indeed, there is no evidence that employees attributed the terminations to retaliatory animus rather than the strike misconduct. Although the Board does not require that a causal nexus be established by inquiries into the employees' subjective state of mind,[14] the Board will consider evidence that disaffection pre-dated the violations or was attributable to other causes.[15] Here, given that the

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[12] See, e.g., Vincent Industrial Plastics, 328 NLRB at 302 (unlawful termination of union president and discipline of steward, each of whom worked in the recently certified unit).

[13] See, e.g., C.F. Martin & Co., Inc., 252 NLRB 1192, 1204 (1980) (unlawful withholding of vacation benefit from strikers not retaliatory nor aimed at causing disaffection; no causal nexus); Colonial Manor Convalescent Center, 188 NLRB 861, 861 (1971) (failure to consider for hire former striker was not an animus-based violation, thus not of a type to cause employee disaffection or affect the union's status).

[14] AT Systems West, Inc., 341 NLRB No. 12, slip op. at 4 (2004).

[15] See, e.g., Lexus of Concord, Inc., 343 NLRB No. 94, slip op. at 2-3 (2004) (no causal nexus where there was evidence that disaffection was caused by factors other than unilateral transfer of employee); Bridgestone/Firestone,

alleged terminations are a technical violation and there is evidence of other causes for the disaffection, we conclude that the General Counsel cannot meet the burden of proving a sufficient causal connection between the strikers' terminations and the Union's loss of majority support.

Accordingly, the Employer has met its burden under Levitz and did not violate Section 8(a)(5) and (1) by withdrawing recognition from the Union upon receipt of objective evidence of the actual loss of majority support in the unit.

B.J.K.

Inc., 335 NLRB 941, 950 (2001) (evidence of pre-existing disaffection militated against finding of taint); Master Slack, 271 NLRB at 78, n.1 and 84-85 (in finding no causal nexus, Board relied on evidence from petition signers that the violations did not motivate their signatures; testimony of subjective intent reliable given context in which violations were of type less likely to cause disaffection).